General Battery Corporation *and* General Drivers, Warehousemen and Helpers Local Union No. 28, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 11-CA-9375

March 22, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 17, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified.[2]

We do not adopt the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) by substituting a nonmeasured wage rate for an incentive rate in the wet formation department in August 1980. The Administrative Law Judge found that the change to the nonmeasured rate was a business decision that had been developing for many months, but that the timing of the change, shortly before a scheduled rerun representation election, raised an inference of unlawful intent that was not rebutted by the evidence presented. We disagree. We conclude that the total evidence establishes that the institution of the nonmeasured rate in August was based on business considerations and was not related to the scheduled election.

Initially, we note that the nonmeasured rate implemented in August was applied only to employees in the wet formation department, who constituted but a small part of the unit in which the election was to be conducted. Further, institution of the nonmeasured rate was consistent with a companywide practice to use such a rate when an incentive rate had not yet been developed for a particular process, piece of equipment, or product, or when an existing incentive rate was no longer valid. At the time the nonmeasured rate was decided on, the wet formation department was experiencing problems with deteriorating equipment that substantially affected production and earnings in the department. These problems had become increasingly serious during the first half of 1980. In January 1980, the level of earnings under incentive rates was at 126.7 percent; in June it reached 107.9; and in July it was at a low point of 107.7. A revision of incentive rates that had been made in April 1980, after a request in February and timestudies in February and March, had proved inadequate, and further study of incentive rates had been directed. Work on equipment replacement and rework of incentive rates had proceeded in May and June, but an attempt by the industrial engineer to supervise installation of new incentive rates during the last week in July had been unsuccessful, and it also became apparent that there would be further significant delays in repairing and replacing equipment. At this point, the decision was made to institute the nonmeasured rate. It was intended to reflect what the expected level of earnings would be if employees were working in a measurable and verifiable situation. The fixed percentage rate adopted, which was 140 percent of the base rate, approximated the rate the wet department employees had earned during an earlier period under the incentive system and the rate that other departments in the plant were currently achieving under incentive rates. In implementing the nonmeasured rate, the Respondent informed the wet formation employees that the rate would be effective for a temporary period until equipment problems in the department were solved, and made no mention of the Union. In these circumstances, we find that institution of the nonmeasured rate in August 1980 did not violate Section 8(a)(1). Accordingly, we shall, and hereby do, dismiss that allegation of the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, General Battery Corporation, Greer, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(b) and (c).
2. Insert the following as paragraph 1(b):

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In view of the limited unfair labor practices found in this case, we modify the broad cease-and-desist order recommended by the Administrative Law Judge.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with reprisals should they engage in any activity on behalf of General Drivers, Warehousemen and Helpers Local Union No. 28, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

GENERAL BATTERY CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on June 3, 1981, at Greenville, South Carolina, upon the General Counsel's complaint which alleged that the Respondent threatened employees and granted them an economic benefit in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent generally denied that it has committed any unfair labor practices, and specifically denied the alleged threats. The Respondent contends that its temporary change from an incentive pay to a fixed hourly wage[1] for certain employees was justified by business considerations and was not violative of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

General Battery Corporation (herein Respondent) is engaged in the manufacture, sale, and distribution of storage batteries for use in vehicles. It has eight manufacturing plants, including the one in Greer, South Carolina (the only facility here involved), and four distribution warehouses. In the course and conduct of its business, the Respondent annually receives directly from points outside the State of South Carolina goods, products, and materials valued in excess of $50,000 and annually ships directly to points outside the State of South Carolina finished products valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Drivers, Warehousemen and Helpers Local Union No. 28, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

As with almost all employees in direct manufacturing companywide, wages of the Greer plant employees are based on production. Thus, for instance, the employees in the wet formation department (where the batteries are filled with acid and charged) the 13 individuals on the crew are treated as a team for the purpose of the incentive rate.

During the times material, the wet formation crew received a base rate of $4.25 per hour (raised to $4.69 on October 1) which they would be paid in the event the production line was down for some reason. When not, their wages would be a function of how much production the crew did in a given period of time (the specifics of the incentive pay system were not set forth in the record and for purposes of this case are largely immaterial). In any event, the incentive rate is higher than the base, is set by the corporate industrial engineering department after studies, and is based on production.

There is general agreement that for at least 3 years there had been problems with production in the wet formation department as a result of deteriorating equipment, which in turn was caused by acid.

Since at least January 1980 this problem had been the source of discussion and communication between the plant manager and higher corporate authorities including the industrial engineering department. According to Robert Ellison, Respondent's director of manufacturing engineering, studies by his department revealed a decreasing performance in the redi-dri[2] and wet formation

[1] This is referred to by the General Counsel as a "guarantee wage rate" and by the Respondent as a "non-measured rate." Here these terms will be used interchangeably.

[2] Redi-dri is an additional production step for special products. It is unclear whether it is a different department involving different employees.

departments from mid-1978 through July 1980, such that by July 1980 they were performing at only 107.7 percent, whereas the overall plant production was 138.3 percent. Performance in the wet formation department in 1977 and for the first 6 months of 1978 had averaged about 140 percent.

According to Ellison, documented by intercompany memos, throughout 1980 the Respondent was engaged in efforts to increase production in wet formation including making substantial capital expenditures on equipment which would be more acid resistant. In conjunction with this, the Respondent was also faced with the problem of setting the appropriate rate and incentive standard for that department. Thus, in a weekly manager's report dated May 4, 1980, the Respondent's plant manager stated, with regard to the wet formation department, "Requested Bob Ellison proceed with purchasing conveyor for formation." And he went on to state, concerning the plant's need for help from industrial engineering, "Rates for redi-dri and wet formation are being returned for additional work. We need methods along with rates." On June 1, 1980, again in a weekly report, the plant manager stated, "I.E. is reworking wet formation rate and layout." On June 22 the plant manager reported, "We need to resolve our methods, equipment and rates," in wet formation; and with regard to the plant's need for help from industrial engineering, "Formation rates and methods."

Finally, according to the testimony of Ellison, in mid-August it was determined to take the wet formation department off of the incentive rate temporarily and institute a fixed rate of 140 percent until such time as the new conveyor and presumably other equipment, could be put in place. What this meant, as far as I am able to determine from the record, is that the employees in the wet formation department went from a base rate of $4.25 per hour to $5.95 which would be their applicable pay for all hours worked when they were actually in production. According to Ellison, the nonmeasured rate, as with the measured rate, would not be applicable to down time. Then the base would be paid.

There is no evidence that any employee in the wet formation department actually began earning more money in late August as a result of this change in method of payment. However, the Respondent's records show the wet formation department was running at about 108 percent in June and July, and for all of 1980 was about 118 percent. Thus to begin paying employees at a rate of 140 percent in August necessarily meant a net pay increase. There is no testimony or other evidence tending to controvert this inference.

In December, the Respondent reestablished the incentive rate for the wet formation department. Thereafter (January or March) for reasons similar to those in 1980, employees in the wet formation department were taken off the incentive rate and put on the guaranteed rate for a period of about 5 weeks.

Ellison testified that to put employees on a guaranteed rate is extraordinary but not completely uncommon when the company is faced with temporary production problems. He could recall no instance where an entire department was put on a guaranteed rate, though he could recall a number of instances not only at the Respondent's Greer plant but at others where from time to time employees were taken off incentive and put on a guarantee. Indeed he testified that companywide there are changes in incentive rates three or four times a week.

Here, however, the change from the incentive rate to the nonmeasured rate occurred about 2 weeks before a rerun election was to be held and during the course of an antiunion campaign engaged in by the Company.[3]

B. *The Issues*

The General Counsel contends that the change from the incentive rate to the nonmeasured rate was intended by the Company to interfere with employees' freedom of choice in the scheduled election and therefore was violative of Section 8(a)(1) of the Act.

In addition, the General Counsel contends that in late August Supervisor Bob Hall threatened employees Wayne Frady and Ronald Merriman, and that Supervisor Joe Howell threatened employee Betty Jean Gray Green in mid-August.

C. *Analysis and Concluding Findings*

1. The pay rate

Although the Respondent certainly has a right to operate its business during the course of an organizational campaign it may not use that as a justification to interfere with rights guaranteed to employees under Section 7 of the Act. Nor is granting benefits to employees during an organizational campaign *per se* unlawful, where it is in general accord with company policy and procedure. *Allis Chalmers Corporation*, 224 NLRB 1199 (1976).

However, where an employer increases wages shortly before a rerun election, and during a time when it is campaigning against the union, there is a presumption of unlawful intent. "We cannot ignore decisional acceleration in employee benefits preceded by months of lethargy." *WKRG-TV, Inc.*, 470 F.2d 1302, 1308 (5th Cir. 1973).

Although all the evidence points to the conclusion that putting in the nonmeasured rate was a business decision which had been developing for many months; there is no evidence to rebut the inference of unlawful intent raised by the timing.

The Respondent had been faced with the problem of deteriorating equipment in the wet formation department as well as deteriorating production by employees in that department. While this matter was the source of discussion and intercompany memos among high level management, no decision was made to change the method by which employees in the wet formation department would be compensated until shortly before the election. There is no evidence why the decision was made and then implemented when it was. In short, the Respondent has brought forth no credible evidence to demonstrate why

[3] In *General Battery Corporation*, 241 NLRB 1166 (1979), among other things, the Board set aside the election held in Case 11-RC-4499 on August 28, 1978, remanding the matter to the Regional Director to schedule a second election. That election was scheduled for September 4, 1980, but was blocked by the filing of the charge in this matter.

it was necessary to grant employees a pay change so close to the election. Further, as noted above, I infer the rate change had the effect of a pay increase for employees in the wet formation department. In June and July their production had been at 108 percent. Thus the nonmeasured rate of 140 percent presupposed an increase. There is no evidence to rebut this inference. The Respondent has explained generally why it was necessary to make the temporary change from incentive to nonmeasured rates in the wet formation department. It has not explained the necessity for the timing and the timing is what makes this a violation of Section 8(a)(1) of the Act. Particularly such is the case when viewed in the context of a substantial antiunion campaign.

I therefore conclude that by instituting the temporary change from an incentive rate to a nonmeasured hourly wage rate of 140 percent, the Respondent granted employees in the wet formation department an increase in their pay at a time when it could have no other effect than that of interfering with their freedom to choose the Union, or not, in the then-scheduled election. I accordingly conclude that the Respondent thereby violated Section 8(a)(1) of the Act.

2. The threats

Both Frady and Merriman testified that one noon during the latter part of August they were in the lunchroom talking between themselves about the Union. They testified that during the course of their discussion Bob Hall, a supervisor but not of either of them, came by and joined the discussion. He told them, according to Frady, that he had worked as a union man but that the union had been of no help to him and further, if the Union came in, the Company "could" take away wages and other benefits employees already enjoyed and could "wipe the slate clean."

Merriman testified that Hall stated the Company "would" take away employees' benefits. Since this event took place some several months before the hearing and lasted a short time, I believe that there is an insignificant distinction between "would" and "could," whatever their semantic differences may be.

While Hall did not specifically deny that he made the statements attributed to him by Frady and Merriman, other than to say he never used the expression "wipe the slate clean," he seemed to deny every aspect of their testimony including that he ever discussed the union campaign with them, ever talked to them in the lunchroom or even talked to them together.

To credit Hall would require believing that the testimony of Frady and Merriman was a total fabrication in every respect. I do not believe it was. Rather, I found Frady and Merriman to be generally credible witnesses and I discredit Hall. I conclude that in fact sometime during the latter part of August they did discuss the union campaign with Hall. During the course of this conversation Hall offered his opinion that in the event the employees voted for the Union the Company could (would) take away benefits and such I conclude was a threat in violation of Section 8(a)(1).

Betty Jean Gray Green testified that in mid-August her supervisor, Joe Howell, handed out literature which concerned the closure of the Johnson Motor Lines and an employee of some 35 years who was put out of work. Upon receiving this antiunion campaign literature, Green asked Howell if the company or the union had closed down the plant and Howell told her that he did not know but probably the company did.

She testified that, some minutes later, Howell advised her to make house payments in advance, telling her he would hate to see her lose the home she had bought a few months before.

Howell testified that he did not talk to Green the day he passed out the antiunion literature but that 2 or 3 days later he told her that the Union could call a strike if it got in and to prepare for such an eventuality she ought to get two or three house payments ahead.

The testimony of Howell and Green does not vary significantly on the substantive fact; namely, after passing out literature depicting a plant closing as a result of union activity Howell then unsolicited told an employee under his supervision that the Union could call a strike and he would hate to see her lose her house.

I conclude that such was a direct implication that, in the event the employees chose the Union, such would be a result. Such was a substantial threat to an employee and exceeded the bounds of permissible antiunion activity or prediction. The Respondent, through Howell, violated Section 8(a)(1) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found, occurring in connection with the Respondent's business have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain appropriate action including posting a notice designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The Respondent, General Battery Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals should they engage in activity on behalf of the Union.

[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Granting employees a wage increase in order to interfere with their freedom to vote or not vote for the Union or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[5]

2. Take the following affirmative action:

(a) Post at its Greer, South Carolina, facility copies of notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[5] Because the unfair labor practices here, while seemingly something less than egregious, occurred shortly following the decision in the first case and shortly before the scheduled rerun election, I believe the Respondent has a proclivity to engage in unfair labor practices. Accordingly, broad injunctive relief is indicated. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[6] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."